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No. 92-1982

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

HILLCREST MEDICAL CENTER, PETITIONER

v.

RONDA SCRIBNER, RESPONDENT

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oklahoma

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REPLY BRIEF FOR THE PETITIONER

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Respondent's counsel managed to persuade a jury to impose $10 million in punitive damages on Hillcrest by using inflammatory and misleading arguments. Counsel uses similar tactics in the Brief in Opposition in an effort to convince this Court to deny certiorari, claiming, for instance, that respondent's life was threatened (Br. in Opp. 3), that Hillcrest "condoned and encouraged" reckless identification of patients (*id.* at 16), and that the hospital's conduct was the most reprehensible imaginable (*id.* at 20). Respondent's rhetoric is completely baseless (and, not surprisingly, is notably lacking in record citations). More importantly, that rhetoric serves to illustrate how even a routine negligence case can be so distorted and exaggerated as to induce an enormous punitive damages verdict.

This Court's recent decision in *TXO Production Corp.* v. *Alliance Resources Corp.*, 61 U.S.L.W. 4766 (June 25, 1993) -- decided after the petition was filed -- makes it clear that the punitive damages in this case are constitutionally untenable. Although the Court upheld the punitive judgment in *TXO*, it reiterated that the Due Process Clause provides a substantive safeguard against unreasonably excessive punitive damages and requires meaningful procedural protections to accompany the punitive process. *Id.* at 4769, 4771-72 (plurality opinion); *id.* at 4775-76, 4779-82 (O'Connor, J., dissenting).

It is difficult to imagine a clearer example than this case of what the Court meant in *TXO* and *Pacific Mutual Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), when it confirmed that punitive damages may be so grossly excessive as to violate due process. The punitive damages here bear no reasonable relation to the goals of punishment and deterrence. Moreover, the punishment was imposed without even the minimum procedural protections provided in *TXO* and *Haslip*. If there is any meaning to the Court's pronouncements in *TXO* and *Haslip*, the punitive damages in this case cannot pass constitutional muster.

Respondent's answer to this, which seems to reflect the view of all too many state courts as well, is telling. According to respondent (Br. in Opp. 12), "Unpredictability is the essence of punitive damages." In this context, however, unpredictability equates to irrationality and is not a constitutionally satisfactory justification. This case offers the Court an exceptionally useful vehicle for further defining the boundaries of the constitutional excessiveness inquiry, an undertaking that would be of great value to the lower courts. If, however, the Court is not prepared to address the subject so soon after *TXO*, the decision below should be vacated and remanded for reconsideration in light of the intervening decision in *TXO*. As we now show, it is wholly inconsistent with the opinions of the *TXO* plurality as well as with Justice Kennedy's concurrence and the *TXO* dissent.

I. *TXO* CONFIRMS THAT THE $5 MILLION PUNISHMENT IN THIS CASE IS UNCONSTITUTIONALLY EXCESSIVE

Although it declined to establish any litmus test for determining excessiveness, the plurality in *TXO* upheld the punitive damages there after examining five factors: (1) "'the harm likely to result from the defendant's conduct'" if its fraudulent scheme had succeeded; (2) "the tremendous financial gains that TXO hoped to achieve through its 'elaborate scheme'"; (3) the "bad faith of [the defendant]"; (4) "the fact that the scheme employed in th[at] case was part of a larger pattern of fraud, trickery and deceit"; and (5) "[the defendant's] wealth." 61 U.S.L.W. at 4770-71 (citations omitted; emphasis deleted).

Justice Kennedy, in concurrence, focused on the third and fourth factors. He found that the punitive damages were not unconstitutionally excessive only because TXO *itself* -- "through its senior officers" -- had acted maliciously as "'part of a pattern and practice * * * to defraud and coerce those in positions of unequal bargaining power.'" 61 U.S.L.W. at

4773 (citation omitted). Justice Kennedy emphasized that *TXO* "was not a case of negligence, strict liability, or *respondeat superior*," and that the defendant's conduct was "'not an isolated incident'" caused by "'poorly supervised, low level employees.'" *Ibid.* (citation omitted). See also *ibid.* ("A case involving vicarious liability, negligence, or strict liability might present different issues.").

Every one of the factors that supported the award in *TXO* calls for reversal of the punitive damages here. Indeed, if the $5 million punishment in this case is left standing, *TXO*'s recognition of constitutional excessiveness review would be meaningless.

A. Likely Harm. Critical to the outcome in *TXO* was the enormous harm that the defendant's fraudulent scheme would have caused had it succeeded. Although the plaintiffs' actual injury amounted to only $19,000, the scheme would have resulted in several *million* dollars of harm if it had not been defeated. *Id.* at 4771 (plurality opinion).

In contrast, there was no evidence whatsoever that the conduct here was likely to cause greater harm than that actually suffered by respondent. Taking a patient for an ultrasound is generally about as non-dangerous as a hospital procedure can be.[1] Indeed, the injury that the jury found respondent to have suffered was itself hardly foreseeable, given that she was scheduled to be ambulatory that same day. Reza Dep. 14-15.

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[1] It bears emphasis that the conduct at issue here is misidentifying a patient for an *ultrasound*, not misidentifying a patient for surgery or some other procedure that entails a real risk of harm. There is *no* evidence that the hospital's employees would exhibit the same "lackadaisical attitude" in identifying a patient for a risky procedure. Indeed, as discussed below (at page 6), there was no evidence at trial that *any* sort of misidentification had *ever* occurred at the hospital either before or since the incident here.

Perhaps it is *conceivable* that the movement of respondent could have set off a chain of events resulting in some worse injury than she actually suffered, but such a result was not at all *likely*. Yet, under *TXO*, potential harm can justify a large punitive damages award only if that harm is "'*likely to result* from the defendant's conduct.'" 61 U.S.L.W. at 4770 (plurality opinion) (quoting *Haslip*, 499 U.S. at 21). If possible, but unlikely, harm were sufficient to justify a large award, *any* instance of negligence would support virtually limitless punishment. This is surely not what the Court intended in *TXO*.

B. Potential Gain. In *TXO*, the defendant stood to reap "tremendous financial gains" if its scheme had succeeded. 61 U.S.L.W. at 4771 (plurality opinion). Here, in contrast, Hillcrest obviously did not expect to gain financially from the negligence of its employees. There was thus no need for a huge punitive judgment to deter future misidentifications. The large compensatory award is itself more than sufficient to induce the hospital to take the proper corrective measures.

C. Reprehensibility of the Conduct. In *TXO*, the defendant engaged in a "malicious and fraudulent" scheme to bilk the plaintiff of millions of dollars. 61 U.S.L.W. at 4771 (plurality opinion). See also *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment). Here, however, the hospital's employees were at most reckless in misidentifying respondent, while the hospital itself was at most negligent in failing to supervise its employees more closely to ensure that they followed the hospital's established identification procedures.

Respondent tries to bridge this evidentiary gap by repeatedly asserting that the hospital was "reckless." But a person acts recklessly only if he or she is conscious of the risk of harm but knowingly disregards it. See generally BLACK'S LAW DICTIONARY 1270-71 (6th ed. 1990). Here, however, even assuming that the hospital's *employees* were

cognizant of a risk of harm attending their failure properly to identify respondent,[2] there was no evidence that the *hospital* was aware that any of its employees were not following proper identification procedures. Indeed, given the utter absence of prior misidentifications, any such conclusion would wholly lack evidentiary foundation. Although the Oklahoma courts imputed the *employees'* alleged recklessness to the hospital on a theory of *respondeat superior*, there was no finding that the hospital itself was actually aware of the risk of harm.[3]

In any case, whether the hospital was reckless or merely negligent, its conduct stands in sharp contrast to the

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[2] The only conceivable basis for a finding that a hospital employee was "reckless" was respondent's testimony that the orderly persisted in helping her from her bed even after she protested that she had recently had surgery and did not know of any scheduled test. Pet. App. 4a. But even that does not suggest an awareness or disregard of a risk of the kind of harm that the jury found respondent to have suffered. In fact, the orderly testified that he did not perceive any such risk. Tr. 125.

[3] Moreover, respondent acknowledges that Hillcrest had adopted appropriate rules regarding patient identification. See, *e.g.*, Br. in Opp. 4, 7-8. But respondent, like the court of appeals (see Pet. App. 7a), invokes these rules as evidence of the hospital's awareness of the risk of misidentification, suggesting that the promulgation of such rules somehow makes Hillcrest's conduct more worthy of severe punishment.

This is utterly nonsensical. Hillcrest's adoption of reasonable patient identification rules signifies that it understood the risk that misidentification in general could pose, and that it took appropriate precautionary steps. It clearly does not show that Hillcrest was aware that misidentification was likely to occur *despite* the existence of these rules. To prove that, respondent would have had to show that Hillcrest knew that its employees were not following its identification rules. Respondent introduced no such evidence.

malicious, fraudulent scheme of the defendant in *TXO*. This case thus presents precisely the situation that Justice Kennedy took pains to distinguish from *TXO* -- that of an employer found liable on the theory of *respondeat superior* for the actions of "poorly supervised, low level employees" who intended no harm. 61 U.S.L.W. at 4773. Assuming that some modest amount of punitive damages may be beyond constitutional reproof in such a case, surely a $5 million exaction is grossly excessive.

D. Pattern of Conduct. The Court in *TXO* found it significant that the malicious conduct of the defendant was not an isolated incident but "was part of a larger pattern of fraud, trickery and deceit." 61 U.S.L.W. 4771 (plurality opinion). See also *id.* at 4773 (Kennedy, J., concurring in part and concurring in the judgment). In this case, by contrast, the misidentification of respondent was *wholly unprecedented*. Respondent's assertion that misidentifications are "routine" (Br. in Opp. 20), and that the hospital "condoned and encouraged" a "reckless patient identification and location system" is not supported by any evidence in the record or by any finding of any court below. It is simply false.[4]

E. The Hospital's "Wealth." Finally, the plurality in *TXO* found that the punitive damages in that case were not excessive in part because of the defendant's enormous wealth -- between $2.2 and $2.5 *billion*. 61 U.S.L.W. at 4768 n.9. Once again, this case is vastly different. Hillcrest is a *not-for-profit* community hospital. And although its net worth

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[4] Respondent's repeated claims (Br. in Opp. 4, 7) that the orderly and his supervisor were unfamiliar with the hospital's identification procedures both at the time of the incident and at the time of trial are also false. The orderly's entire testimony shows that he was aware of the hospital's identification procedures but did not properly follow them in this case. Tr. 109-145. Moreover, the supervisor specifically stated that the orderly and ultrasound technologist were aware of the correct identification procedures. Tr. 288.

was $110 million, that worth consisted largely of its building, equipment, and other illiquid assets vital to its provision of patient services. Tr. 652. Whatever its net worth, then, Hillcrest is qualitatively different from the huge, profit-making corporation in *TXO*. Instead of merely decreasing "profits," the $5 million punitive judgment will inevitably affect the hospital's ability to provide quality health care at affordable cost.

* * *

In sum, it is impossible to uphold the punitive damages in this case under the factors applied in *TXO*. In addition, it bears reemphasizing that the punitive damages here were 50 times greater than compensatory damages (and more than 1840 times greater than respondent's out-of-pocket losses). Although such a massive disparity between punitive and actual damages may not be dispositive in and of itself, the *TXO* plurality suggested that punitive damages must bear a reasonable relation to *some* objective factor -- whether it is actual damages, potential harm, or something else. 61 U.S.L.W. at 4771. This case involves punishment grossly disproportionate to *any* proper indicator of the gravity of the misconduct or the need for deterrence. At a minimum, then, the courts below should be required to reconsider the enormous punishment here in light of *TXO*.

II. THE PROCEDURES IN THIS CASE FAILED TO SATISFY DUE PROCESS REQUIREMENTS

Respondent contends (Br. in Opp. 17) that Hillcrest received due process simply by being accorded a jury trial and judicial review. This Court's decisions in *TXO* and *Haslip*, however, do not support such a crabbed view of the procedural protections afforded by the Fourteenth Amendment. Those decisions hold that due process requires at least minimal guidance to the jury about how to determine the amount of punitive damages and *meaningful* review of the jury's punishment by the trial court and court of appeals.

Because no such procedural protections were provided here, the imposition of punitive damages violates due process.

A. Jury Instructions. In *TXO*, the Court declined to address whether the instructions on punitive damages provided a sufficient constraint on the jury's discretion, finding that the argument had not been preserved. 61 U.S.L.W. at 4772 (plurality opinion). There is no dispute that Hillcrest preserved its challenge to the jury instructions and that the challenge was considered and rejected by the Oklahoma Court of Appeals. See Pet. 9-10 & n.8. The Court therefore should address the issue in this case.

Two factors in particular are worthy of mention. First, the jury instructions here provided even less guidance on fixing the amount of punitive damages than the instructions in either *Haslip* or *TXO*.[5] In *TXO*, the jury at least was told that it should consider "all of the circumstances surrounding the particular occurrence, including the *nature of the wrongdoing*, the *extent of the harm* inflicted, the *intent* of the party committing the act * * * [and] any *mitigating circumstances* which may operate to reduce the amount of the damages." 61 U.S.L.W. at 4771 n.29 (plurality opinion) (emphases added).

Here, in contrast, the jury was told merely to impose whatever amount it "reasonably believe[d] will punish and be an example to others." Instruction 22; Tr. 683. This instruction left the jury with limitless discretion, since any large award would punish and deter. But the plurality in *TXO* specifically rejected the idea that "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." 61 U.S.L.W. at 4769.

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[5] A comparison of the instruction here with that in *Haslip* is set out at Pet. 18-21.

Moreover, although it did not rule on the question, the Court in *TXO* expressed serious concern that the "emphasis on the wealth of the wrongdoer" at trial "increased the risk that the award may have been influenced by prejudice against large corporations." 61 U.S.L.W. at 4771 (plurality opinion). See also *id.* at 4779-80 (O'Connor, J., dissenting). An even greater risk of prejudice was present here. Respondent's counsel repeatedly stressed the hospital's net worth. Indeed, in a closing argument remarkably similar to the argument that disturbed the Court in *TXO*,[6] counsel urged the jury to impose a severe monetary punishment solely because Hillcrest was a large corporation with substantial net worth.

Although consideration of Hillcrest's net worth by the jury may not have been *per se* unconstitutional, see *TXO*, 61 U.S.L.W. at 4771 (plurality opinion); *id.* at 4779 (O'Connor, J., dissenting), the repeated and misleading emphasis at trial on Hillcrest's "wealth" created a grave risk that the jury severely penalized the hospital on account of its net worth and corporate status rather than as a means of furthering the purposes of retribution and deterrence. This risk was exacerbated by the utter lack of guidance to the jury on how it should consider Hillcrest's net worth or how it should determine what amount of punitive damages was appropriate to punish and deter. The jury instructions therefore completely failed to inform or constrain the jury's discretion.

B. Judicial Review. The Court in *TXO* found that the judicial review of the punitive damages in that case provided a sufficient check on the jury's discretion to satisfy procedural due process. It noted that the trial court had provided an "adequate hearing" on TXO's postverdict challenge to the award. 61 U.S.L.W. at 4772 (plurality opinion). In addition, the appellate court had considered the propriety of

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[6] Compare Pet. 8-9 with 61 U.S.L.W. at 4780 (O'Connor, J., dissenting).

the punitive damages in light of "'(1) the potential harm that TXO's actions could have caused; (2) the maliciousness of TXO's actions; and (3) the penalty necessary to discourage TXO from undertaking such endeavors in the future.'" *Id.* at 4768 (citation omitted). See also *id.* at 4772.

This case, in contrast, lacked any meaningful judicial review of the jury's punitive exaction. The trial court does not appear even to have *considered* whether the jury's punishment was unconstitutionally excessive. It merely stated that the evidence was sufficient to submit the issue of punitive damages to the jury in the first place. Pet. App. 22a.

The court of appeals, in turn, simply held that the jury's award of $10 million was "'larger than reason dictates to be necessary to deter such conduct'" and was "'not . . . properly responsive to the legitimate objective of a punitive damage award.'" Pet. App. 20a (citations omitted). It provided no explanation, however, of why a $5 million award was not excessive.

This type of standardless review cannot possibly satisfy due process. If the punitive exaction in this case is left in place, courts will continue to feel free to provide only the most cursory, subjective review of punitive damages -- a situation that does little to serve the constitutional requirement of fair and rational decisionmaking.

CONCLUSION

For the reasons stated above, Hillcrest's petition for a writ of certiorari should be granted and the case heard on the merits. At a minimum, the judgment of the Oklahoma Court of Appeals should be vacated and the case remanded for further consideration in light of *TXO*.

Respectfully submitted.

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